Supreme Court, U.S.
FILED
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93-422

NO.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

STEPHEN MEDVIK,

Petitioner,

vs.

CITY OF UNIVERSITY CITY, MISSOURI
FRANK OLLENDORFF, CITY MANAGER
OF UNIVERSITY CITY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In this 42 U.S.C. Section 1983 civil rights action alleging that the state regulation under which petitioner was fired was facially unconstitutional, was the District Court precluded, under the full faith and credit requirements of 28 U.S.C. Section 1738, from hearing petitioner's claims on the merits by reason of a state appellate decision, reviewing his discharge, which upheld the constitutionality of the regulation?

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U.S. CONST. amend. XIV, § 1

28 U.S.C. § 1738 (1988)

42 U.S.C. § 1983

Employees Handbook City of University City, Mo., Work Rules

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported as Medvick v. City of University City, No. 92-3450EM, slip op. (8th Cir. June 15, 1988). Plaintiff's state petition for review of his discharge is reported as Medvik v. Ollendorff, 772 S.W.2d 696 (Mo. Ct. App. 1989), cert. denied, 493 U.S. 1071 (1990).

GROUNDS FOR JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered judgment against Petitioner on June 15, 1993. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

PROVISIONS INVOLVED

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person

within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. § 1738 (1988).

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities

> secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

> EMPLOYEES HANDBOOK City of University City, Missouri . . . . WORK RULES . . . . GROUP 1 . . . . Fourth Offense..... Discharge . . . . 20. An incident involving an unwanted or imprudent statement or action to a co-worker of a sexual, racial, ethnic or religious nature.

Employees Handbook City of University City, Mo., Work Rule, Group 1, Paragraph 20.

STATEMENT OF THE CASE

Petitioner Stephen Medvik was fired from his job as a mechanic for University City, Missouri, for violating a work rule which prohibited: "An incident involving an unwanted or imprudent statement or action to a co-worker of a sexual, racial, ethnic or religious nature."[1] Petitioner filed a Petition for Review in state court, alleging that this state regulation was facially unconstitutional under the First, Fifth, and Fourteenth Amendments to the United States Constitution. An intermediate state appellate court found that the regulation was not facially unconstitutional, and the state supreme court denied a discretionary application for transfer.

Thereafter, petitioner filed a civil rights action under 42 U.S.C. § 1983 in the United States District Court for the Eastern District of

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[1] Petitioner, in a conversation with his supervisor, referred to an African-American co-worker as a "nigger."

Missouri, reiterating the claims of facial unconstitutionality which he had raised unsuccessfully in state court. The district court granted summary judgment on the grounds that petitioner was precluded by the full faith and credit provisions of 28 U.S.C. § 1738 (1988) from litigating the facial constitutionality of the state regulation in federal court once the state court had upheld it. The United States Court of Appeals for the Eighth Circuit affirmed.

REASONS WHY THE WRIT SHOULD ISSUE

Congress did not intend to make state courts the final arbiters as to the facial constitutionality of their own statutes and regulations

In Allen v. McCurry, 449 U.S. 90 (1980), in reviewing the applicability of the full faith and credit provisions of 28 U.S.C. §1738 to civil rights claims under 42 U.S.C. §1983, the majority stated: "In reviewing the legislative history of Section 1983 in Monroe v. Pape, supra [365 U.S. 167 (1964)], the Court inferred that Congress had intended a federal remedy in three circumstances: where state substantive law was facially unconstitutional, where state procedural law was inadequate to allow full litigation of a constitutional claim, and where state procedural law, though adequate in theory, was inadequate in practice." Id., 449 U.S. at 100-101 (Emphasis added.).

The dissenters' departure from the majority was specifically over the majority's

interpretation of Monroe v. Pape's recital of the "'three main aims'" of Section 1983. According to the dissent, the majority viewed these "as a delineation of when the [federal] remedy would be available [in federal court]." The dissenters thought that Monroe v. Pape's "articulation of these three purposes were intended only as illustrative of why the 42d Congress chose to establish a federal remedy in federal court." Allen v. McCurry, supra at 111 (Blackman, J., dissenting).

Plaintiff's complaint clearly attacks defendants' Work Rule as "state substantive law" which is "facially unconstitutional." Jt. App. 6-7. The doctrine of Monroe v. Pape, and the interpretation thereof by the Allen v. McCurry majority "as a delineation of when the remedy would be available," is as valid today as ever. "In Monroe, this Court . . . explained that Section 1983 was intended . . . to 'override' . . . unconstitutional state laws, . . ." Zinermon

v. Burch, 494 U.S. 113 (1990).

At least one district court has specifically recognized that facial unconstitutionality is an exception to the use of "[t]he doctrine of collateral estoppel" in "a civil rights case":

> The bar may be raised when the later civil action is a civil rights case. Allen v. McCurry, 449 U.S. 90, 104, 191 S. Ct. 411, 420, 66 L.Ed.2d 308 (1980). Three exceptions have been articulated: Where state substantive law was facially unconstitutional, where state procedural law was inadequate to allow full litigation of a constitutional claim, and where state procedural law, though adequate in theory, was inadequate in practice. Id. at 100-101, 101 S.Ct. at 418-419.

Seaman v. City of Reno, 559 F. Supp. 683, 687 (D. Nev. 1983) (Emphasis added.).

The decision below is the first case ever to hold that § 1738 full faith and credit allows a state court decision that a state statute or regulation is not facially unconstitutional to tie a federal court's hands when that issue

arises in a § 1983 case.[2] Neither the district court opinion nor the court of appeals opinion below even mentions Monroe v. Pape, supra, Seaman v. City of Reno, supra, nor any of the language from the majority and dissenting opinions in Allen v. McCurry, supra, quoted above.

It is clear beyond peradventure that "exceptions" two ("where state procedural law was inadequate to allow full litigation of a constitutional claim") and three ("where state procedural law, though adequate in theory, was inadequate in practice") in Allen v. McCurry are

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[2] In Hiska v. City of Stevens Point, 823 F.2d 1168 (7th Cir. 1987), Willhauck v. Halpin, 953 F.2d 689 (1st Cir. 1991), and Corpus Christi Taxpayer's Ass'n v. Corpus Christi, 858 F.2d 973 (5th Cir. 1988), the courts in fact applied § 1738 to bar constitutional challenges to state statutes which had been upheld by their state courts. The issue of whether "facial unconstitutionality" is an exception to § 1738 full faith and credit requirements is not discussed in any of these cases, nor is Monroe v. Pape, supra, Seaman v. City of Reno, supra, nor any of the language quoted above from the majority and dissenting opinions in Allen v. McCurry, supra, even mentioned, much less discussed.

considered in almost every federal case where the bar of § 1738 is raised. See, e.g., Gjelluim v. City of Birmingham, 829 F.2d 1056 (11th Cir. 1987), and Lumen Constr., Inc. v. Brant Constr. Co., 780 F.2d 691 (7th Cir. 1986). This reaffirms the Allen v. McCurry dissenters' and District Judge Reed's understanding that the Allen majority viewed the "'three main aims'" of §1983, as discussed in Monroe v. Pape, "as a delineation of when the [federal] remedy would be available [in federal court]." There is no logical reason for recognizing the last two of these "exceptions" while rejecting the first ("facial unconstitutionality").

Allowing state courts to be the final arbiters as to whether their own laws violate the federal constitution defeats the very purpose for which §1983 was enacted: "[T]he [congressional] debates [on Section 1983] show that one strong motive behind its enactment was grave congressional concern that the state courts had

been deficient in protecting federal rights." Allen v. McCurry, supra at 98-99. "Congress realized that in enacting Section 1983 it was altering the balance of judicial power between the state and federal courts." Id. at 99.

> Congress deliberately opened the federal courts to individual citizens in response to the States' failure to provide justice in their own courts. . . . Congress specifically made a determination that federal oversight of constitutional determinations through the federal courts was necessary to ensure the effective enforcement of constitutional rights. . . . Congress consciously acted in the broadest possible manner.

Allen v. McCurry, supra at 108-110 (Blackman, J., dissenting).

> The very purpose of Section 1983 was to interpose the federal courts between the States and the people, as guardians of the

> people's federal rights ---- to protect the people from unconstitutional actions under color of state law, "whether that action be executive, legislative, or judicial." . . . Congress was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failures extended to the state courts.

Mitchum v. Foster, 407 U.S. 225, 242 (1972).

With the deplorable congestion of federal dockets, there is great pressure to eliminate cases from those dockets wherever such action is consistent with the Constitution of the United States, congressional intent, and justice. Whenever a state court has determined a factual issue after a full and fair hearing, none of these considerations require relitigation thereof, even though such adjudications affect

the individual litigant's constitutional rights. On the other hand, where the state's violation of fundamental constitutional rights is plain for all to see on the face of the state statute or regulation, there is no concomitant justification for forbidding federal courts the opportunity to remedy an obvious wrong.

Any doubt as to the parochial misjudgment of the intermediate state appellate panel was erased by this Court in R.A.V. v. City of St. Paul, 505 U.S. ____, 120 L. Ed. 2d 305 (1992). In that case, Minnesota had attempted to criminalize the placing "on public or private property" of "a symbol, object, appellation, characterization or graffiti, . . . which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion, or gender." Id., 505 U.S. at ___, 120 L. Ed. 2d at 315. This Court held that this ordinance was facially unconstitutional because:

> [T]he ordinance applies only to "fighting words that insult, or provoke violence, on the basis of race, color, creed, religion or gender." Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specific disfavored topics. Those who wish to use "fighting words" in connection with other ideas --- to express hostility, for example, on the basis of political affiliations, union membership, or homosexuality --- are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.

Id., 505 U.S. at ___, 120 L. Ed. 2d at 323. In the instant case, plaintiff was prohibited from making "an unwanted or imprudent statement to a co-worker of a sexual, racial, ethnic or religious nature." Thus, plaintiff could have

made an "unwanted or imprudent statement to a co-worker" concerning, for example, "political affiliation" or "union membership" without fear of discharge under the "work rule" in question. In R.A.V., the regulation "proscribed fighting words of whatever manner that communicate messages of racial, gender, or religious intolerance." Id., 505 U.S. at ___, 120 L. Ed. 2d at 324. Here, the regulation has proscribed "unwanted or imprudent statements" which "communicate messages" of "sexual, racial, ethnic or religious" intolerance. "Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas. That possibility would alone be enough to render the ordinance presumptively invalid." Id., 505 U.S. at ___, 120 L. Ed. 2d at 324-25.

Nor should the regulation have withstood First Amendment scrutiny prior to R.A.V., e.g., Riley v. National Fed'n of the Blind, 487 U.S. 781 (1988); Gooding v. Wilson, 405 U.S. 518

(1972); Keyishian v. Board of Regents, 385 U.S. 589 (1967). It is also "void for vagueness." Broderick v. Oklahoma, 413 U.S. 601 (1973); Boutilier v. INS, 387 U.S. 118 (1967); Connally v. General Constr. Co., 269 U.S. 385 (1926).

While it is reasonable to give preclusive effect to state factual findings, according finality to state court decisions preserving their own laws against federal constitutional attacks serves no legitimate public interest, state or federal. The decision below effectively removes § 1983 as a shield against regulations banning "politically incorrect" speech, and reduces it to a vehicle for the collection of damages in those instances where there is no state court decision upholding the challenged law. This is not what Congress intended. The Writ should be granted to determine whether "facial unconstitutionality" is still an "exception" to the full faith and credit provisions of § 1723.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 92-3450EM

Stephen Medvick,	*	
	*	
Appellant,	*	
	*	Appeal from the United
v.	*	States District Court
	*	for the Eastern
City of University	*	District of Missouri.
City, Missouri; Frank	*	
Ollendorff, City	*	[PUBLISHED]
Manager of University	*	
City,	*	
	*	
Appellees.	*	

Submitted: April 12, 1993

Filed: June 15, 1993

Before FAGG, Circuit Judge, PECK,* Senior Circuit Judge, and MAGILL, Circuit Judge.

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*The HONORABLE JOHN W. PECK, Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

PER CURIAM.

The City of University City (City) discharged Stephen Medvick, a city mechanic, for using abusive language in violation of a city work rule. After unsuccessfully challenging the constitutionality of the work rule in state court, see Medvick v. Ollendorff, 772 S.W.2d 696 (Mo. Ct. App. 1989), cert. denied, 493 U.S. 1071 (1990), Medvick brought this 42 U.S.C. § 1983 action against the City and the City's manager, Frank Ollendorff, claiming the discharge violated his due process and freedom of speech rights. The district court granted the City and Ollendorff summary judgment on the ground of res judicata (claim preclusion) because Medvick raised the identical constitutional claims against the same parties and lost on the merits in his state court action. See 28 U.S.C. § 1738 (1988). Medvick appeals and we affirm.

Under § 1738, a state court judgment is entitled to the same full faith and credit in a

federal court as the judgment is given by state law. Allen v. McCurry, 449 U.S. 90, 96 (1980). Because Missouri recognizes the doctrine of res judicata, a federal court presented with a § 1983 action in Missouri must apply the doctrine to give preclusive effect to a Missouri court judgment. See Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 80-85 (1984); Allen, 449 U.S. at 96-98. In this case, Medvick's § 1983 complaint involves the same cause of action, parties, and relief as his earlier state court lawsuit. Thus, we agree with the district court that Medvick's § 1983 action is barred by res judicata. See State ex rel. Tinnon v. Mueller, 846 S.W.2d 752, 758 (Mo. Ct. App. 1993) (listing res judicata elements).

Medvick does not dispute that his federal and state actions are identical, but contends an intervening change in the law prevents the application of res judicata to his § 1983 action. We disagree. Although Missouri recognizes that

an intervening change in the law may prevent the application of collateral estoppel (issue preclusion), Missouri Real Estate Comm'n v. Carr, 695 S.W.2d 169, 170 (Mo. Ct. App. 1985), no similar exception exists for the doctrine of res judicata (claim preclusion), Snyder v. Snyder, 788 S.W.2d 339, 341-42 (Mo. Ct. App. 1990). Here, because res judicata precludes Medvick's § 1983 action, any intervening change in the law is irrelevant. See Snyder, 788 S.W.2d at 342; Estate of Egan v. Commissioner, 260 F.2d 779, 785 (8th Cir. 1958).

Medvick also contends the work rule he violated is facially unconstitutional, and thus, the full faith and credit requirements of § 1738 do not apply to his § 1983 action. According to Medvick, § 1983 actions claiming facial unconstitutionality are an exception to the application of § 1738 under Allen. The Supreme Court, however, held just the opposite in Allen. "[N]othing in the language of § 1983 remotely

expresses any congressional intent to contravene the common-law rules of preclusion or to repeal the express statutory requirements of the predecessor of 28 U.S.C. § 1738. . . . Section 1983 creates a new federal cause of action. It says nothing about the preclusive effect of state-court judgments." Allen, 449 U.S. at 97-98; see also Migra, 465 U.S. at 80-85. Thus, even if the work rule is facially unconstitutional, § 1738 applies to Medvick's § 1983 action.

Accordingly, we affirm.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

STEPHEN MEDVIK,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 91-1462C(8)
	)	
CITY OF UNIVERSITY CITY, et al.,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

This matter is before the Court on defendants' motion for summary judgment. Plaintiff brings this suit pursuant to 42 U.S.C. § 1983 alleging that his due process rights and his right to freedom of speech were violated by defendants. Defendants assert that the present action is barred by: (1) the doctrine of res judicata; (2) the doctrine of collateral estoppel; and (3) the statute of limitations.

FACTUAL BACKGROUND

Plaintiff was employed by defendant City of University City ("University City") from 1978 to March 21, 1985 when he was fired. Plaintiff was discharged for directing "abusive language" to a coworker in violation a work rule of University City. Plaintiff appealed his discharge to the Civil Service Board of University City ("the Board") which heard evidence on the matter. The Board recommended that plaintiff be given a two month suspension rather than a discharge. Defendant Frank Ollendorf, the City Manager of University City, rejected the Board's recommendation and upheld the discharge. Plaintiff then filed a petition for review in the Circuit Court of St. Louis County. The Circuit Court sustained the petition and ordered plaintiff reinstated. On appeal the Missouri Court of Appeals remanded the cause for further proceedings before defendant Ollendorf. Defendant Ollendorf again

sustained the discharge. Subsequently, plaintiff filed an amended petition in the Circuit Court of St. Louis County which was denied. Plaintiff appealed to the Missouri Court of Appeals which affirmed the circuit court's decision. Plaintiff then filed a petition for writ of certiorari to the United States Supreme Court. The Court denied plaintiff's petition. Plaintiff now brings the same claims in this Court pursuant to 42 U.S.C. § 1983. Plaintiff alleges that the procedures used by the Board denied his due process rights and that his due process rights were violated because the rule which he is accused of violating is so vague and indefinite that it gives no warning of what conduct is forbidden. He also alleges that the rule violates his right to freedom of speech.

ANALYSIS

Under 28 U.S.C. § 1738, the "[a]cts, records and judicial proceedings" of a state

court "shall have the same full faith and credit in every court within the United States ... as they have by law or usage in the courts of such State ... from which they are taken." This section "specifically require[s] federal courts to give preclusive effect to state court judgments whenever the courts of the State from which the judgments emerged would do so." Allen v. McCurry, 449 U.S. 90, 96 (1980).

> Missouri law recognizes two types of preclusion. The doctrine of res judicata precludes relitigation of claims in a later lawsuit that were or could have been litigated in a prior lawsuit between the same parties. The doctrine of collateral estoppel precludes relitigation of an issue in a later lawsuit by the party against whom the issue was decided in a prior lawsuit.

Swapshire v. Baer, 865 F.2d 948, 950 (8th Cir. 1989) (citations omitted). Under Missouri law a party will be collaterally estopped from relitigating an issue decided in a prior suit when (1) the issue decided was identical to the issue now sought to be litigated, (2) the prior

adjudication resulted in a judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party to the prior adjudication, and (4) that party had a full and fair opportunity to litigate the issue in the prior suit. Id. at 950-51; Baker v. McCoy, 739 F.2d 381, 384 (8th Cir. 1984). The United States Supreme Court has specifically found that the doctrines of res judicata and collateral estoppel are applicable to suits brought pursuant to 42 U.S.C. § 1983. Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75 (1983); Allen v. McCurry, 449 U.S. 90 (1980).

The claims brought by plaintiff and decided in state court are exactly the same as the claims he is presenting to this Court. In fact, the complaints in both proceedings are almost identical. The state court clearly decided the issues against plaintiff on the merits and plaintiff was a party to the prior

lawsuit. Plaintiff seems to argue that the fourth condition was not fulfilled. However, plaintiff does not state that he did not have a full and fair opportunity to litigate his claims in state court, instead he asserts that

> the procedure whereby the body which holds the hearing has no power to decide, and the decision maker hears no evidence, certainly calls into question whether he was afforded "a 'full and fair opportunity' to litigate" his firing --- as does his complaint that "there was no evidence, and no finding, that plaintiff's ability to perform his job was impaired, or that the efficient operation of the City's government was interfered with, by plaintiff's statement to his co-worker." Compl. 19-20.

(Plaintiff's memorandum at 4-5). Thus, plaintiff seems to argue that he did not get a full and fair opportunity by the Board and defendant Ollendorf to litigate his termination. The state court addressed the issue of the procedures used by defendants in its decision to terminate plaintiff's employment and the Missouri Court of Appeals specifically found that "Medvik was given the

process required" in an administrative hearing. Medvik v. Ollendorf, 772 S.W.2d 696, 700 (Mo. App. 1989), cert. denied, 493 U.S. 1071 (1990). Moreover, the "full and fair opportunity" condition refers to the proceedings in state court, not the administrative procedures, and plaintiff has not asserted nor is there any evidence that he was not given a full and fair opportunity to litigate his claims in state court. All four conditions for issue preclusion are met in this case. Because the claims plaintiff is presenting to this Court were decided against plaintiff by the state court they are given preclusive effect in this federal lawsuit.[1]

Accordingly, for the foregoing reasons,

IT IS HEREBY ORDERED that defendants' motion for summary judgment is granted.

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[1] Because the Court finds that this action is barred by res judicata and collateral estoppel it need not address whether the statute of limitations also bars this action.

UNITED STATES DISTRICT JUDGE

Dated: 8/14/92

APPENDIX C

Stephen MEDVIK, Plaintiff/Appellant,

v.

Frank OLLENDORFF,
Defendant/Respondent.

No. 54792.

Missouri Court of Appeals,
Eastern District,
Division Four.

April 18, 1989.

Motion for Rehearing and/or Transfer to Supreme Court Denied May 17, 1989.

Application to Transfer Denied Aug. 1, 1989.

SATZ, Judge.

. . . .

Medvik also contends his right to due process was violated because the conduct prohibited by Group I, Rule 20, one of the grounds of his discharge, is too vaguely defined and, therefore, does not pass constitutional muster. We disagree.

> [A] statute which either forbids or requires [conduct] in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law....

Ferguson Police Officers Ass'n v. City of Ferguson, 670 S.W.2d 921, 927 (Mo. App. 1984).

This "void for vagueness doctrine" is applicable to civil as well as criminal cases. Id. The doctrine serves two purposes. It ensures that the person of ordinary intelligence is given a reasonable opportunity to know what is prohibited, so that he may act accordingly. It also protects against arbitrary and discriminatory enforcement by ensuring that laws provide explicit standards for those who apply them. State ex rel. Cook v. Saynes, 713 S.W.2d 258, 260 (Mo. banc 1986).

Rule 20 authorized sanctions against Medvik for "an unwanted or imprudent statement ... to a co-worker of a sexual, racial, ethnic or religious nature." Medvik contends these

words do not give him "reasonable opportunity to know what is prohibited." For example, he argues, one can imagine a joke or comment touching on race or gender that would be offensive to a sensitive hearer. Contrary to the speakers expectations, he contends, such a statement could be deemed "unwanted" or "imprudent" and, thus, a Rule 20 violation. Therefore, he concludes, the rule is "so vague that its enforcement cannot help but result in arbitrary and capricious restrictions upon employees' freedom of speech." We disagree.

Medvik's argument is misdirected and forced. We are not required to determine whether the Rule could conceivably be enforced in a discriminatory manner. It will pass constitutional muster if it is susceptible to a reasonable construction supporting its constitutionality. Bell v. Board of Education of City of St. Louis, 711 S.W.2d 950, 953 (Mo. App. 1986).

Admittedly, the vagueness doctrine amy require greater precision in drafting regulations affecting free speech than those affecting other conduct. Ferguson Police, supra at 927. A rule designed to prevent inflammatory and disruptive statements, however, necessarily involves some inherent uncertainty. Other than a litany of selected terms, an alternate definition that provides a bright line between permissible and impermissible speech in the work place is not readily apparent. It is necessary that a person subject to the rule be able to make some judgment whether his statement is prohibited. Ferguson Police, supra at 927. At this stage of civilized history, persons of normal intelligence are capable of determining whether a racial remark is "unwanted" or "imprudent." We do not believe the guarantee of due process requires the City to define these terms with "mathematical precision." Saynes, supra at

261. Rule 20 is not void for vagueness.

Medvik makes a similar argument in asserting Rule 20 is impermissibly overbroad. Under the Rule, he contends, "a University City employee may be fired for upholding Professor Shockley's views, in the presence of a black co-worker, that whites have higher IQ's, for criticizing 'women drivers' to a female co-worker, or for denying the divinity of Christ in the hearing of a Christian co-worker." Because Rule 20 prohibits constitutionally protected speech, plaintiff contends, it is facially invalid. Again, we disagree.

The overbreadth doctrine does not require invalidation of the prohibition unless it is "substantially overbroad" and not fairly susceptible to a construction that would limit its applicability to a constitutionally permissible scope. Airport Commissioner v. Jews for Jesus, Inc., 482 U.S. 569, 107 S.Ct. 2568, 2573, 96 L.Ed. 2d 500 (1987). We need

not and do not construe Rule 20 as broadly as does Medvik. See Christian v. City of Kansas City, 710 S.W.2d 11, 14 (Mo. App. 1986); State v. Swoboda, 658 S.W.2d 24, 25 (Mo. banc 1983). As an employer, the government has an interest in maintaining an orderly work place, which may include removal of disruptive employees who tend to impair efficiency. See Connick v. Myers, 461 U.S. 138, 150-51, 103 S.Ct. 1684, 1693, 75 L.Ed. 2d 708 (1983). To serve this interest, Rule 20 prohibits statements "to a co-worker" of a racial nature that are "unwanted or imprudent." Sensibly read, this language does not seek to deter harmless jokes or statement on social or political issues; rather, it is properly designed to prohibit well known pejoratives unacceptable in the work place.

Given this sensible construction, we conclude, Rule 20 is not "substantially overbroad." See Broadrick v. Oklahoma, 413

U.S. 601, 615, 93 S.Ct. 2908, 2918, 37 L.Ed.2d 830 (1973); Gooding v. Wilson, 405 U.S. 518, 523, 92 S.Ct. 1103, 1106-7, 31 L.Ed.2d 408 (1972). Conceivably, it may be susceptible to an improper application. It is unnecessary, however, to find it facially invalid because an employee's arguably protected speech may be reached or chilled by the rule. Broadrick, supra 413 U.S. at 618, 93 S.Ct. at 2919. The Rule was designed to deter the kind of statements made by Medvik. This Court has said:

> Where there are a substantial number of situations to which the statute or regulation might validly apply, we will not strike down the provisions for overbreadth. . . . If the rights of persons on the edge of the regulation's applicability will be infringed, it will be for them to make the challenge in a concrete dispute.

Ferguson Police, supra at 929.

Medvik cites State v. Swoboda, 658 S.W.2d 24 (Mo. banc 1983), which struck down a state

peace disturbance statute as overbroad. Swoboda is not controlling here.

Criminal statutes, as in Swoboda, must be scrutinized for overbreadth with particular care. E.g., City of Houston v. Hill, 482 U.S. 451, 459, 107 S.Ct. 2502, 2508, 96 L.Ed.2d 398 (1987). Rule 20, in issue here, is not a criminal statute applied to a member of the general public. It is an administrative regulation applicable only to municipal employees for comments made to co-workers in the work place. Implicit in our prior decisions is the unarticulated principle that, as an employer, a government entity may regulate speech among its employees under rules that may be overbroad if applied to the public in general. See, e.g., Fitzgerald v. Nations, 610 S.W.2d 48 (Mo. App. 1980), cert. denied, 452 U.S. 906, 101 S.Ct. 3032, 69 L.Ed.2d 407 (1981).

NO.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

STEPHEN MEDVIK,

Petitioner,

vs.

CITY OF UNIVERSITY CITY, MISSOURI
FRANK OLLENDORFF, CITY MANAGER
OF UNIVERSITY CITY,

Respondents.

CERTIFICATE OF SERVICE

I hereby certify that three copies of the Petition for Writ of Certiorari have been served on defendants by mailing same, postage prepaid, to Richard E. Greenberg, ROSENBLUM, GOLDENHERSH, SILVERSTEIN & ZAFFT, P.C., 7733 Forsyth Boulevard, Fourth Floor, Clayton, Missouri 63105 on this 13th day of September, 1993.

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